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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. BUD SHELTON, Defendant and Appellant.	D060162 (Super. Ct. No. SCE300054)

APPEAL from a judgment of the Superior Court of San Diego County, Peter C. Deddeh, Judge. Affirmed.

Bud Shelton appeals the judgment sentencing him to prison for 11 years four months after he pleaded guilty to attempted robbery (Pen. Code, §§ 211, 664; undesignated section reference are to this code) and admitted he personally used a firearm in the offense (§ 12022.53, subd. (b)). Shelton contends imposition of the 10-year enhancement under section 12022.53, subdivision (b) violated his federal

constitutional rights to due process and equal protection. We agree with the line of California cases rejecting such contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Shelton admitted he attempted to rob a convenience store with an unloaded rifle. He pleaded guilty to attempted robbery (§§ 211, 664) and assault with a firearm (§ 245, subd. (a)(2)). In connection with the attempted robbery charge, Shelton admitted he personally used a firearm. (§§ 12022.5, subd. (a), 12022.53, subd. (b).) In connection with the assault with a firearm charge, he admitted he personally used a deadly weapon and a firearm. (§§ 1192.7, subd. (c)(23), 12022.5, subd. (a).)

At the sentencing hearing, Shelton urged the court not to impose the section 12022.53 enhancement.[1] He contended imposition of the enhancement would violate his right to the equal protection of the laws because a defendant who attempts robbery with a fake firearm is not subject to the enhancement, and his unloaded rifle was tantamount to a fake firearm. Shelton also argued section 12022.53 is irrational and violates public policy by encouraging criminals to use loaded rather than unloaded firearms: "The message of this law, unfortunately and inadvertently, is that if you use a gun, you're going to go to prison. However, if you are going to use a gun, be sure to put a bullet in

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1 Section 12022.53 provides that a person who "personally uses a firearm" in the commission of specified felonies (including attempted robbery) "shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply." (§ 12022.53, subds. (a)(4), (18), (b).)

the chamber, because there's no reason not to. There's no reason to go in with an unloaded gun because you're going to get the 10 years no matter what."

The trial court rejected these contentions. It sentenced Shelton to prison for 16 months for the attempted robbery (§§ 18, subd. (a), 213, subd. (b)) and added a consecutive term of 10 years for the firearm enhancement (§ 12022.53, subd. (b)). The court also imposed but stayed execution of prison terms for the assault with a firearm conviction and all the other enhancements. (§ 654.)

Shelton obtained a certificate of probable cause and filed this appeal. (§ 1237.5.)

DISCUSSION

In challenging the trial court's imposition of the 10-year enhancement under section 12022.53, Shelton raises a single issue on appeal: "whether there is or is not a rational basis for the dissimilar treatment of unloaded guns and fake or replica guns." He contends that because neither a fake firearm nor an unloaded firearm can fire a projectile, imposing the enhancement on a person who attempts robbery with an unloaded firearm but not punishing a person who attempts robbery with a fake firearm raises "both equal protection and due process concerns under the Fourteenth Amendment." We disagree.

The constitutional provisions on which Shelton relies prohibit a state from "depriv[ing] any person of life, liberty, or property, without due process of law," and from "deny[ing] to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend., § 1.) The equal protection clause "is essentially a direction that all persons similarly situated should be treated alike." (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439; accord, *People v. Brown* (2012) 54 Cal.4th 314,

328.) "[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." (*Romer v. Evans* (1996) 517 U.S. 620, 631.) Similarly, a statute that does not burden a fundamental right will be upheld against a due process challenge as long as the statutory classification rests upon a rational basis. (*Bowen v. Gilliard* (1987) 483 U.S. 587, 603.) Claims of sentencing disparity are evaluated under the rational basis test. (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1386; *People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1116 (*Alvarez*).)

Enhancing the sentences of defendants who use real but unloaded firearms to commit crimes under section 12022.53 but not those of defendants who use fake firearms to commit the same crimes easily passes the rational basis test. The Legislature's stated intent in enacting section 12022.53 is to impose "substantially longer prison sentences . . . on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime." (Stats. 1997, ch. 503, § 1.) The potential for injury to citizens or for a crime to turn violent is obviously much greater if a criminal uses a real but unloaded firearm than if he uses a fake firearm. The Legislature rationally could conclude a real firearm (even if unloaded) is more likely than a fake firearm to frighten a victim and thereby "give[] a perpetrator a strong advantage over the victim and effectively deter[] the victim's escape." (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1215.) The Legislature also rationally could conclude that real "firearms pose a potentially greater risk to safety than other weapons because of their inherent ability to harm a greater number of victims more rapidly." (*People v. Perez* (2001) 86 Cal.App.4th

675, 678 (*Perez*).) Unlike a fake firearm, an unloaded real firearm may be loaded, thereby becoming "particularly lethal to the victim of the underlying crime as well as others in the vicinity" and "allow[ing] the perpetrator to effortlessly and instantaneously execute an intent to kill once it is formed." (*Zepeda*, at p. 1215.) In other words, "[t]he ease with which a victim of one of the enumerated felonies [in section 12022.53] could be killed or injured if a firearm is involved clearly supports a legislative distinction treating firearm offenses more harshly than the same crimes committed by other means, in order to deter the use of firearms and save lives." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 497-498; accord, *Alvarez*, *supra*, 88 Cal.App.4th at p. 1118.) Hence, imposing a section 12022.53 enhancement on a felon who uses a real but unloaded firearm but not on a felon who uses a fake firearm "is rationally related to the intent offered by the Legislature and supports legitimate state interests of citizen safety and deterrence of violent crime." (*Perez*, at p. 680; accord, *People v. Taylor* (2001) 93 Cal.App.4th 318, 322 (*Taylor*).)

We are not persuaded to reach a different conclusion by the three cases cited by Shelton drawing a distinction between loaded and unloaded firearms. Two federal cases held the greater punishment for a criminal who uses a gun and "assaults any person or puts in jeopardy the life of any person by the use of a dangerous weapon or device" during a bank robbery (18 U.S.C. § 2113(d)) required proof the gun was loaded. (*United States v. Jones* (9th Cir. 1975) 512 F.2d 347, 351-352; *United States v. Potts* (N.D.Cal. 1982) 548 F.Supp. 1239, 1242.) Those holdings required interpretation of the words "assault," "puts in jeopardy" and "dangerous weapon" in the context of the entire statute.

(*Potts*, at pp. 1240-1241.) In *People v. Brookins* (1989) 215 Cal.App.3d 1297, 1307, also cited by Shelton, the court held an unloaded firearm not used as a bludgeon was not a "deadly weapon" within the meaning of section 667.7. Unlike the statutes considered in the cases Shelton relies on, section 12022.53 presents no issue of statutory interpretation. Rather, it expressly provides: "*The firearm need not be* operable or *loaded for this enhancement to apply*." (§ 12022.53, subd. (b), italics added.)

We also decline Shelton's invitation to create what he calls "a due process exception" to the enhancement prescribed by section 12022.53, subdivision (b) for cases in which "the defense has convincingly demonstrated that the firearm was not loaded." According to Shelton:

> "The message of the current statute, if read without a public policy exception, is that you might as well load a firearm you plan to use in a robbery because you will be treated the same whether the firearm is loaded or unloaded. And this raises a serious public policy concern because it encourages people to load firearms even if they might otherwise be predisposed to not load the firearm in order to lessen the danger of someone being hurt during the robbery."

Shelton has cited no evidence to support this argument; and we doubt armed robbers make the decision whether to load their firearms based on the punishment they may receive under section 12022.53, as Shelton's argument assumes they do. To the extent armed robbers do consider such punishment when deciding whether to load their firearms, section 12022.53 may already encourage them not to load them because use of an unloaded firearm results in an enhancement of only 10 years (*id.*, subd. (b)), whereas use of a loaded firearm may result in an enhancement of 20 years if the firearm is discharged (*id.*, subd. (c)) or 25 years to life if it is discharged and causes death or great

bodily injury (*id.*, subd. (d)). In any event, Shelton's policy arguments should be addressed to the Legislature, not to us, for it is the prerogative of the Legislature, within constitutional limits not exceeded here, to prescribe the punishments for crimes. (See, e.g., *People v. Wilkinson* (2004) 33 Cal.4th 821, 840; *People v. Tanner* (1935) 3 Cal.2d 279, 298; *Perez*, *supra*, 86 Cal.App.4th at pp. 679-680.)

In sum, consistent with other California courts that have rejected similar equal protection and due process challenges to section 12022.53, we reject Shelton's challenges. (See *People v. Hernandez* (2005) 134 Cal.App.4th 474, 480-483; *Taylor*, *supra*, 93 Cal.App.4th at p. 322; *Alvarez*, *supra*, 88 Cal.App.4th at pp. 1116-1119; *Perez*, *supra*, 86 Cal.App.4th at pp. 678-680.)

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.